APPENDIX A

Opinion of the United States District Court for the District of South Carolina (Columbia Division)

(Robert W. Hemphill, J.)

Civil Action No. 73-103

COLGATE W. DARDEN, III, *Plaintiff*

v.

ELIZABETH J. WITHAM, ET AL., *Defendants*

Disguising his case as a civil rights case under the provisions of 42 U.S.C. §§ 1981, *et. seq.*, plaintiff, by complaint filed January 24, 1973, asked the following relief:

(1) The finding that the action is a proper action for consideration by a statutory three-judge court and the convening of such court to hear the action pursuant to 22 U.S.C. § 2281;

(2) The issuing of a preliminary and permanent injunction, staying, pursuant to 42 U.S.C. § 1983, all proceedings in the State Court action, *Darden* v. *Witham*, in the Court of Common Pleas for Aiken County, South Carolina, and in the Supreme Court of South Carolina, until the Federal Court could issue a final decision on the merits of this action;

(3) Issuing preliminary and permanent injunctions against the enforcement of the Code of Laws of South Carolina, 1962, as amended, Section 20-112;

(4) Declaring, pursuant to 28 U.S.C. §§ 2201, 2202, and 2284 that the Code of Laws of the State of South Carolina, 1962, as amended, Section 20-112, is invalid on its face and as applied under the Equal Protection and Due Process Clauses of the United States Constitution, Amendment XIV;

(5) Awarding plaintiff his costs of the action; and

(6) Granting such other and further relief as the court seems [sic] equitable, et cetera.

The real effort in this case is plaintiff's hope of having this court relieve him from an award, in the State Court, to his wife's attorneys, of attorneys' fees in the amount of One Hundred Seventy-Five Thousand ($175,000.00) Dollars. In order to get the jurisdiction of this court, and have a duplication of action resulting in "two bites at the cherry," plaintiff pleads the constitutionality of Section 20-112. This court will take judicial notice of the fact that in the State action, entitled Colgate W. Darden, III, Appellate, against Elizabeth J. Witham, formerly Elizabeth J. Darden, and the Virginia National Bank of Norfolk, Virginia, Respondents, now pending (having been heard in oral argument at the May Term, 1973, of the South Carolina Supreme Court), contains in the record Exception No. 5 which reads as follows:

> That his Honor (Judge Ness) erred in refusing to receive evidence as to the constitutionality of Section 20-112, South Carolina Code of Laws of 1962, the error being that said Section is unconstitutional in that it discriminates against the husband in favor of the wife[1]

This court feels that the case is improperly in this court for the reasons hereinafter stated.

BACKGROUND

In an uncontested divorce action reduced to final judgment, defendant Elizabeth J. Witham was granted a divorce in 1967, divorcing her from her husband—plaintiff Darden—on the grounds of desertion; the decree of the court incorporated an agreement between the parties pro-

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[1] An asterisk at the end of this Exception in the transcript of record, a copy of which has been furnished to this member of the court by the Clerk of the Supreme Court of South Carolina, notes as a footnote as follows: (Appellant reserves such rights as it may have to present constitutional issues arising under the Constitution of the United States of America to the United States Courts for determination.")

viding for alimony to the divorced wife. In that agreement, plantiff agreed to pay defendant Witham alimony in the amount of Ninety Thousand ($90,000.00) Dollars per year for the first ten (10) years subsequent to the divorce, Eighty Thousand ($80,000.00) Dollars per year for the next ten (10) years, the payments to cease after twenty (20) years or when the wife died, whichever occurred first. Later there was controversy between the parties, ultimately resolved by mutual agreements, as to (1) the children accompanying the mother on a trip abroad (resolved March 1969) and (2) the choice of a proper school for the children (resolved June 1971). The alimony agreement provided that the payments would continue whether or not Mrs. Witham remarried. The complaint in the present action, was filed in the United States District Court for the District of South Carolina on January 24, 1973;[2] plaintiff alleges that the defendant law firms received a fee of One Hundred Five Thousand ($105,000.00) Dollars for their services rendered to defendant Witham in the first phase, the divorce action. It does not appear that any part of this fee was paid by the plaintiff.

Subsequent to the divorce, Mrs. Witham remarried, and plaintiff elected to bring an action in the State Court seeking to have his divorce obligations, as to alimony payments, terminated because of her remarriage. This case was heard in the State trial court, lost by plaintiff and by him appealed to the South Carolina Supreme Court, *Darden* v. *Witham*, — S.C. —, 188 S.E.2d 776. The Supreme Court of South Carolina affirmed the lower court's denial of relief to the plaintiff. In the State Court proceeding both the lower court and the Supreme Court ruled that plaintiff's obligation to make the alimony payments to defendant was

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[2] In the State Court, the notice of motion that attorneys for Mrs. Witham would move before the Resident Judge of the Second Judicial Circuit of South Carolina for the setting of a reasonable attorney's fee dated June 26, 1972.

not terminated by a remarriage and that the plaintiff's action was "essentially an outgrowth of, and supplementary to the original 1967 divorce action," and, "that an award of an attorney's fee is quite proper." The plaintiff did not appeal this decision to the United States Supreme Court.

A transcript of record on appeal to the South Carolina Supreme Court in this latest case, involving attorneys' fees, shows that the parties participated in extensive discovery in an adversary proceeding held for the purpose of setting the amount of such fee. The resident judge of the Second South Carolina Judicial Circuit, after a full hearing, found that One Hundred Seventy-Five Thousand ($175,000.00) Dollars was a reasonable amount for such attorney's fee, and that decision is the decision now under appellate review in the South Carolina Supreme Court. On the second appeal, plaintiff raised and argued extensively the position that the statute under which the award was made, South Carolina Code Section 20-112 is unconstitutional on grounds that the statute denied him equal protection by unwarranted sexual discrimination.

Plaintiff has processed in the State courts all of the issues arising out of the 1968 divorce decree, and all the issues raised in this Federal court action have been raised in the State court action. The State court action was commenced almost two years ago, and it has been processed in two trials and one appeal, and another appeal has been heard by the State Supreme Court. Plaintiff now seeks to have the Federal court review every possible Federal issue he has taken up in the State court in his second appeal.

Presently, this court is called upon to pass upon a motion by defendants Witham; Blatt, Fales, Peeples, Bedingfield and Loadholt (one law firm) and Henderson, Salley, Bodenheimer and Lynn (another law firm) to dismiss the action because the complaint fails to state a claim against

the defendants upon which relief can be granted. This motion was filed February 8, 1973, and heard February 12, 1973. Counsel asked for time to forward additional briefs to the court, and this was granted.

THREE-JUDGE COURT

Except for his effort to have this case categorized as a civil rights suit under the provisions of 42 U.S.C. § 1981, *et seq.* plaintiff raises no issues in this court which are not presently before the South Carolina Supreme Court in the pending case of *Darden* v. *Witham* (No. 7980) so that it is obvious that the case which the plaintiff now wishes the Federal Court to hear not only has been heard by the State Court, but is essentially a domestic relations case. It has long been the policy of the United States that the Federal Courts will not act in domestic relations cases and probate matters, an understandable reason being "these are areas of law in which the States have an especially strong interest and a well developed competence for dealing with them." Wright, *Law of Federal Courts*, page 84 (2d edition 1970).

It is true that, in an effort to come within the periphery of 28 U.S.C. § 2281, plaintiff has named the State Circuit Judge, the Clerk of the State Supreme Court, and the Clerk of Court of Common Pleas for Aiken County as defendants, seeking to restrain them from enforcing the challenged statute. In his brief, however, at page 19, the plaintiff asserts, (and admits) that "the interested parties in the dispute herein are solely private litigants and that no interest of the sovereign state is jeopardized by Federal intervention here." It therefore appears obvious that the State Officers have been named perfunctory [sic] or as nominal defendants purely in an attempt to satisfy the requirements of the jurisdictional section. A three-judge Federal Court should not be convened to decide this domestic relations case between private litigants, on a foundation such as exists here:

> There is settled law that a State Officer cannot be named perfunctorily or as a nominal defendant in an attempt to obtain the wanted official action. Bond v. Dentzer, 325 F.Supp. 1343, 1348 (N.D. N.Y. 1971), citing Moody v. Flowers, 387 U.S. 97; Wilentz v. Sovereign Camp, 306 U.S. 573; Oklahoma Gas & Electric Co., v. Oklahoma Packing Co., 292 U.S. 386.

As stated by Chief Judge Haynsworth in *Maryland Citizens for a Representative General Assembly* v. *The Governor of Maryland*, 429 F.2d 606, 611:

> If it appears to the single district judge, therefore, that the complaint does not state a substantial claim for injunctive relief, he need not request the convening of a three-judge court. Insubstantiality in the claim may appear because of absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable. Such insubstantiality may be evident from the frivolous nature of the claim or from previous decisions of the Supreme Court which require an adverse answer. When it thus appears that there is no substantial question for a three-judge court to answer, dismissal of the claim for injunctive relief by the single district judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure.[3]

Before this court is a case in which a State action is proceeding, and in that State action the constitutionality of the South Carolina Code sections challenged in this court is there challenged. The Supreme Court of South Carolina has the challenge under advisement. In the event of an ad-

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[3] See also Star v. Parks, 345 F.Supp. 795 (D. Md. 1972); Barthelmes v. Morris, 342 F.Supp. 153 (D. Md. 1972); Shapiro v. State of Maryland, 336 F.Supp. 1205 (D. Md. 1972).

verse decision, either party can petition for certiorari to the United States Supreme Court. These facts make frivolous the efforts of the plaintiff and they also bring this case within the ambit of *Younger* v. *Harris,* 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). The effect of this court's entertainment of this suit and the granting of any injunction at this time would be in direct violation of what the Supreme Court prohibited in *Younger,* supra, declaring the granting of an injunction was "a violation of national policy forbidding federal courts to stay or enjoin pending State Court proceedings except under special circumstances." (401 U.S. 41). The Supreme Court reviewed the long standing public policy against Federal court intervention with State court proceedings. One of the basic reasonings for this policy is "the doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

In order to avoid the presumption against Federal court interference with pending State action as enunciated in *Younger,* the plaintiff must show that, unless the Federal court interferes with the State action, he is in great and immediate danger of suffering irreparable injury. In the case before this court, as was said in *Veen* v. *Davis*:[4]

> Although the Complaint does allege "great, immediate and irreparable injury and loss to plaintiffs," this is merely conclusory for, under the facts as alleged and the offer of proof at the hearing on the Temporary Restraining Order, it is clear that plaintiffs have not carried their burden of showing they have suffered any injury other than each being required to defend single state court prosecutions.

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[4] 326 F.Supp. 116 (C.D. California 1971); see also Pederson v. Breier, 327 F.Supp. 1382 (D.C. Wisconsin 1971).

Here plaintiff asserts abridgement of no First Amendment right, such as freedom of speech, press or assembly. He claims that because of "the possibility that he may be ordered to pay the further large fees to Mrs. Witham's attorneys"[5] in the possible future disputes that the "statute is chilling plaintiff's resort to the courts"[6], and that if the Federal court refused to intervene "the plaintiff *may* [emphasis added] be forced to litigate the issue once again in the context of the future proceeding that he might prefer to avoid."[7]

This is not a Federal court case. It is a domestic case and all the window dressing cannot change the true nature of the action.

Additionally, on the grounds of comity, plaintiff's suit should be dismissed. The Supreme Court of South Carolina held in *Darden* v. *Witham, supra,* that the action to invalidate the alimony section of the divorce decree was essentially a part of the original 1967 divorce action; and, as such, an award of an attorney's fee was quite proper. As was said in *Collins* v. *Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961), the statutory allowance of an attorney's fee is authorized for services in the particular divorce action before the court.[8] Only when subsequent litigation attacks the

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[5] Page 5 of the plaintiff's brief.

[6] Page 22 of plaintiff's brief.

[7] *Ibid.*

[8] Section 20-112 of the 1962 Code which is the statutory authority for respondent's claim, provides that in every action for absolute divorce the wife, whether plaintiff or defendant, may apply for allowance of a fee for her attorney, and that if such claim appears well founded the court shall allow a reasonable sum therefor. The statute does not suggest that the fee be in anywise referable to services in other litigation, and we construe it as authorizing its allowance for service in the particular action only.

validity of a hardened decree of divorce does it become so vitally dependent as to become an actual part of the original divorce proceeding and within the attorney's fee authorization. Such restricted construction by the South Carolina Supreme Court eliminates the possibility of "harassment" or "chilling effect" which the plaintiff claims.

Younger and its companion cases dealt with comity as it applied in a criminal context. The Fourth Circuit in a recent case of *Lynch* v. *Snepp*, No. 72-2377 (4 Cir., January 26, 1973), decided the question: "to what extent the general notions of comity, equity and federalism, as exposited in *Younger* and its companion cases, apply in this civil context?" The court found that the reasons for applying these general notions of comity, equity and federalism are at least equally as great in the civil case as in a criminal context.

Snepp, in a brilliant treatment of the comity between the two sovereignties, quoted *Wilson* v. *Schnettler*, 365 U.S. 381, 385, 81 S.Ct. 632, 635, 5 L.Ed.2d 620 (1961), in that:

> We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them.

The court went on to say that one such rule earlier adopted by the court is that:

> Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.

Taylor v. *Tainter*, 16 Wall. 366, 370, 21 L.Ed. 287 (1873). Thus ordinarily the jurisdiction of a state court first obtained should not be interfered with by federal courts. *Ex parte Chetwood*, 165 U.S. 443, 17 S.Ct. 385, 41 L.Ed. 782 (1897).

Snepp was appealed by North Carolina officials from the granting of a preliminary injunction by a United States District Judge. The federal injunction had the effect of restraining the enforcement of a state injunction intended to control access to the public schools of Mecklenburg County, North Carolina. In reversing the lower court, the Court of Appeals spoke extensively of the "long standing public policy against federal court interference with state court proceeding." [Sic]

In the case before us, for this court to take jurisdiction and to entertain issues which are presently before the South Carolina Supreme Court, not concluded, and which should properly be pursued there or taken to the United States Supreme Court, would indicate a lack of comity in which this court will not engage.

For the reasons stated the motion to dismiss is granted.

And It Is So Ordered.

APPENDIX B

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 73-1962

COLGATE W. DARDEN, III *Appellant*

v.

ELIZABETH J. WITHAM, ET AL., *Appellees*

PER CURIAM:

The plaintiff and the defendant Witham have been engaged in litigation in the State Courts for a number of years. Such litigation involves their prior marriage and a support and maintenance agreement made in connection with their divorce. As a result of an order entered by the State Court in this litigation, the defendant Witham was awarded substantial attorneys' fees against the plaintiff. The order granting such award is pending on appeal before the Supreme Court of South Carolina. In fact, the appeal has been heard orally and only awaits the filing of an opinion. At this stage in the State proceedings, the plaintiff filed this federal action, seeking to enjoin further proceedings in the State Courts in the litigation between him and his former wife; the plaintiff also sought a declaratory judgment of the invalidity on federal constitutional grounds of Section 20-112, Code of Laws of South Carolina (1962), on which it is alleged the award of attorneys' fees was made, and for an injunction against its enforcement. He denominated his action a class action and requested the convening of a three-judge court under the terms of Section 2281, 28 U.S.C. The District Court, in a thoughtful and well-reasoned opinion, found that comity compelled the dismissal of the action and the denial of the request for the convening of a three-judge court. We agree. The plaintiff is before the Supreme Court of South Carolina; the issue of the constitutional validity of Section 20-112 is before that Court and it may be assumed will be resolved by that Court. Respect for that Court commands that we defer to that Court in ruling on the constitutionality of the statute in question.

AFFIRMED.

APPENDIX C

Opinion of the Court of Common Pleas for Aiken County, South Carolina

(J. B. Ness, J.)

(July 15, 1971) (Order Portion Only)

COLGATE W. DARDEN, III

v.

ELIZABETH J. WITHAM

Ordered that the Petition herein be, and the same hereby is, dismissed.

Further ordered that the respondent, Elizabeth J. Witham, be, and she hereby is, granted permission to apply to this Court, if she be so advised, for a reasonable attorneys' fee to be paid to her attorneys for defending this action.

Further ordered that the petitioner, Colgate W. Darden, III, be, and he hereby is, directed to pay immediately upon the filing of this Order the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) owed to the respondent, Elizabeth J. Witham, as of May 1, 1971.

Further ordered that the petioner, Colgate W. Darden, III, be, and he hereby is, directed to timely comply with all of the terms of the Decree of Divorce and the Property Settlement Agreement between said petitioner and the respondent, Elizabeth J. Witham, dated October 27, 1967, with particular reference to the terms of the said Decree and Property Settlement Agreement providing for quarterly payments to the respondent, Elizabeth J. Witham.

APPENDIX D

Opinion of the Court of Common Pleas for Aiken County, South Carolina (J. B. Ness, J.) (November 11, 1972) (First Five Paragraphs only)

COLGATE W. DARDEN, III

v.

ELIZABETH J. WITHAM

This is a motion to set a reasonable attorneys' fee in the above entitled matter, pursuant to Order of this Court dated July 15, 1971, affirmed by the Supreme Court of South Carolina, ...S.C. ...., 188 S.E.2d 776, and remanded by the Supreme Court to this Court for the sole purpose of establishing such fee. This action was originally instituted by the Petitioner to set aside a property settlement agreement made a part of an action for divorce between Petitioner and Respondent, Witham, and which original action resulted in the aforesaid Order of this Court dated July 15, 1971, denying the relief sought by Petitioner and directing that Petitioner pay a reasonable attorneys' fee for services rendered by Respondent's attorneys therein. In that connection the Order of this Court under consideration stated:

> "The respondent Witham seeks a reasonable attorneys' fee for the attorneys defending this action for her, and it is my opinion that Sections 20-112, 20-113 and 20-116 authorize this Court, in the exercise of its discretion, to award such fees. In addition, it would seem to this Court that Section 20-116 which authorizes the Court to make such modifications in the payment of alimony as changed circumstances may warrant, carries with it the inherent authority to award attorneys' fees to the wife where the Court feels that the circumstances and equities of the situation demand it. The Annotation in 15 A.L.R.2d 1270, and the cases of *Walters* v. *Walters* (Ill.), 99 N.E.2d 342, *Barnette* v. *Barnette* (Ariz.), 388 P.2d 433, and *Jacobson* v. *Jacobson* (Ill.), 200 N.E.2d 379, are supportive authorities

for this position. Since there is no evidence before this Court upon which I can at this time determine a reasonable attorneys' fee to be paid to the respondent Witham's attorneys, said respondent is hereby granted leave to hereafter make petition to this Court, as she may be advised, for a hearing at which time a reasonable fee for her attorneys can be determined."

Appealing the decision of this Court to the Supreme Court of South Carolina, the attorneys for the Petitioner included in their exceptions to the July 15, 1971, Order of this Court Exceptions 12 and 13, as follows:

Exception (12): "That His Honor erred in granting attorneys' fees to Respondent's attorneys, the error being that the granting of attorneys' fees is not authorized under the Uniform Declaratory Judgment Act, Section 10-2001, Code of 1962, under which this action was brought."

Exception (13): "That His Honor erred in granting attorneys' fees to Respondent's attorneys, the error being that it is clear from the record that she is of such wealth as to be fully able to compensate her own attorneys."

The Supreme Court of South Carolina in affirming the Order of this Court in its entirety (*Darden* vs. *Witham*, et al., ... of .... S.C. ...., 188 S.E.2d 776), at page ... of ... S.C. ... stated:

"Darden excepts to that portion of Judge Ness' order which granted Witham leave to apply to the court for attorneys' fees. He contends that this action was originally brought pursuant to the Declaratory Judgment Act (Code § 10-200 et seq.) He further contends that that Act permits an award of costs (§ 10-2010) but not an award of attorneys' fees.

"Judge Ness issued a supplemental order on July 23, 1971, wherein he states that 'it was agreed for both

parties that this Court would consider the entire matter as a Declaratory Judgment action and would pass upon all issues raised.

"While the matter may have been treated as a declaratory judgment action by consent, the fact remains that this suit is essentially an outgrowth of, and supplementary to, the original 1967 divorce action. Normally the issues before us would have been determined within the divorce proceeding. The fact that the same issues were presented by way of a declaratory judgment proceeding should not alter the obligation of Darden to pay attorneys' fees if, under Code Section 20-112, the court deemed this appropriate. Under these circumstances we feel that an award of an attorney's fee is quite proper and the case is remanded to the lower court for disposition of that matter."

At the commencement of the Hearing held responsive to the Motion of Respondent's counsel asking this Court to set a reasonable attorneys' fee for them, counsel for Petitioner raised the question that the issue before the Court was not solely the amount of the fee but urged that the Court must first determine whether Respondent's counsel were entitled to a fee and, if so, then determine the amount of such fee. It is clear to me that my earlier Order of July 15, 1971, affirmed by the South Carolina Supreme Court, expressly provided that the Petitioner should pay Respondent's attorneys a reasonable fee and left only for later decision the actual amount of that fee. I did then, and do now, deem it appropriate, under Section 20-112 of the 1962 Code of Laws, as amended, that Petitioner be required to pay a reasonable fee to the attorneys for the Respondent, Witham, for their services in this matter. Certainly this was the intent of that Order, and proof that Petitioner's attorneys understood clearly the intent of that Order, and acted thereon, is best revealed by their two exceptions to the Order as heretofore set forth.

Referring to these two exceptions, the Supreme Court, in affirming the Order, stated that this Court had authority under Section 20-112 of the 1962 Code of Laws, as amended, to award attorneys' fees to Respondent's attorneys if this Court deemed such award appropriate, and there is no doubt in my mind that all parties understood from the earlier Order that this Court had found and determined such an award to be appropriate. The Supreme Court further stated that it felt such award was quite proper and it demanded the case to this Court for the setting of a reasonable fee. Based on these factors I hold as a matter of law at the commencement of the Hearing on this question that the only issue remaining before me in this case was the determination of a reasonable amount to be paid by the Petitioner to the Respondent's attorneys. Even if it could now be said that there was some doubt as to the actual meaning of my Order of July 15, 1971, by Exception 12 and Exception 13 of his appeal to the Supreme Court, Petitioner questioned the authority of this Court to grant the fee now sought and the correctness of this Court in awarding such a fee, and the decision of the Supreme Court expressly upholding this Court in reference to these two particular exceptions has now become the law of this case. *Jenkins* v. *Southern Railway Company,* 145 S.C. 161, 143 S.E. 113.